



WAGGONER CARR
ATTORNEY GENERAL

**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

June 7, 1963

Partly overruled by
Trinity Universal Ins. Co. v.
J. C. McLaughlin, et al
373 SW 2d 66

Honorable D. C. Greer
State Highway Engineer
Texas Highway Department
Austin, Texas

Opinion No. C- 96

Re: Whether the Highway Department
may dispense with the require-
ment that the contractor fur-
nish an affidavit of bills paid
prior to making final payment
by virtue of Senate Bill 213.

Dear Mr. Greer:

Your request for an opinion recites that on April 26, 1963, Senate Bill 213 was signed into law by the Governor and went into immediate effect. This bill deleted that portion of Article 6674m, Vernon's Civil Statutes, that stated:

"and final payment shall not be made until it is shown that all sums of money due for any labor, materials, or equipment furnished for the purpose of such improvements made under any such contract have been paid."

You have submitted to us a request for our opinion on the following questions:

"1. May this Department dispense with the requirement that the contractor furnish an affidavit of bills paid prior to making final payment?"

"2. May this Department now make final payment to contractors on jobs completed in the past where no such affidavit was furnished?"

"3. . . . In the event your answer to Question No. 2 is in the affirmative, please advise us whether or not:

"a. The State may pay the money retained on these contracts directly to surety by warrant issued in surety's name."

"b. The State or any of the officials involved would be liable to surety if payment were made to the contractor."

As early as 1857, the Texas Supreme Court held in The State v. Andrews, 20 Tex. 230, that where an amendatory act of the legislature reads that a certain section of a previous act shall hereafter read as follows, any provision of the previous act which is not found in the amendatory act is repealed.

In Texas Farm Bureau Cotton Ass'n v. Lennox, 296 S.W. 325 (Tex.Civ.App. 1927), the Court was concerned with an amendatory act regarding jurisdiction and held:

"The present act, an amendatory statute . . . declares that the earlier act . . . shall be 'amended so as to read as follows.' From this it follows that the legislative intention was a recasting of the whole language of the earlier article. . . . In effect, all such portions of the original as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute. State v. Andrews, 20 Tex. 230."

Senate Bill 213 states as follows:

"Section 1. That Section 13 of Chapter 186, Acts of 1925, 39th Legislature, Regular Session (Article 6674m, Revised Civil Statutes) be amended so that it shall hereafter read as follows:

"Section 13. Said contracts may provide for partial payments to an amount not exceeding ninety-five per cent (95%) of the value of the work done. Five per cent (5%) of the contract price shall be retained until the entire work has been completed and accepted."

Inasmuch as the legislature amended Article 6674m, Vernon's Civil Statutes, and deleted that portion which stated:

"And final payment shall not be made until it is shown that all sums of money due for labor, materials, or equipment furnished for the purpose of such improvements made under any such contract have been paid,"

it is our opinion that the legislature intended that such requirement no longer be mandatory upon the Texas Highway Department and that the remaining five per cent (5%) of the contract price be retained until such time when the work has been completed and accepted.

Since your first question directed to us is "may this Department dispense with the requirement that the contractor furnish an affidavit of bills paid prior to making final payment?", your attention is directed to Article 6674k and 6674l, Vernon's Civil Statutes:

"Article 6674k. Form of contract

"The State Highway Commission shall prescribe the form of such contracts and may include therein such matters as they may deem advantageous to the State. Such forms shall be uniform, as near as may be."

"Article 6674l. Signing contracts

"Every such contract for highway improvement under the provisions of this act shall be made in the name of the State of Texas; signed by the State Highway Engineer, approved by at least two members of the State Highway Commission and signed by the contracting party, and no such contract shall be entered into which will create a liability on the part of the State in excess of funds available for expenditure under the terms of this Act."

In Johnson v. Ferguson, 55 S.W.2d 153, (Tex.Civ.App. 1932, error dismissed.), the Court said:

"To the members of the commission and in large measure to its chief engineer are intrusted responsibilities of outstanding importance. To meet these responsibilities they are invested with a wide discretion. . . . Their acts in the exercise of an honest discretion, must be respected when untainted by fraud and unassailed on account of accident or mistake occurring in their performance, or such abuse of discretion as under the authorities would avoid the same."

It is our opinion that although it is no longer mandatory that the State Highway Department require an affidavit of bills paid from the contractor, it may, in the discretion of the State Highway Commission, require all contractors to furnish such an

affidavit. This requirement could be included in the contract if the Texas Highway Commission deemed such matter to be advantageous to the State.

With respect to your second question regarding final payments to contractors on jobs completed in the past where no such affidavit of bills paid was furnished, the law seems to be well settled that statutes which subsist at the time and place of the making of a contract enter into it and form a part of it as if such statutes were expressly referred to or incorporated in its terms. Winder Bros. v. Sterling, 118 Tex. 268, 12 S.W.2d 127, (1929).

In the case of Smith v. Elliott & Deats, 39 Tex. 201, (1873), the Court said:

"That the laws which exist at the time and place of the making of a contract enter into and form a part of it, embracing alike those which affect its validity, its construction, its discharge, and its enforcement, forms a rule recognized by numerous authorities of the highest character . . . Von Hoffman v. City of Quincy, 4 Wall 550 . . . In the case of Von Hoffman v. City of Quincy, above cited, Mr. Justice Swayne says: 'It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into ~~and~~ form a part of it as if they were expressly referred to, or incorporated in its terms.'"

In regard to the contracts entered into prior to Senate Bill 213, such contracts were executed at a time when by statute it was mandatory that an affidavit of bills paid be furnished by the contractor prior to the payment of the remaining five per cent (5%). Therefore, in answer to your second question it is our opinion that on contracts executed prior to the date Senate Bill 213 became effective the existing law required the contractors to furnish proof that all bills had been paid, that such law became a part of the contracts and that the Texas Highway Department cannot now make final payment to contractors on such contracts until such time that proof of payment of all bills has been furnished.


Inasmuch as your request for an opinion on questions 3.a and 3.b was contingent on an affirmative answer to question number two (2), these questions are not answered herein.

SUMMARY

Senate Bill 213 which was signed into law on April 26, 1963, and which amended Article 6674m, Vernon's Civil Statutes, no longer makes it mandatory that the Texas Highway Department require an affidavit from contractors that all bills have been paid. However, all contracts executed after April 26, 1963, may include this requirement in the discretion of the Highway Commission. On contracts executed prior to April 26, 1963, the contractors must comply with the law as it existed at such time and an affidavit of bills paid must be furnished the Texas Highway Department prior to receiving final payment.

Very truly yours,

WAGGONER CARR
Attorney General of Texas

By 
RICHARD E. BOWERS
Assistant Attorney General

REB:pm

APPROVED:

OPINION COMMITTEE:
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APPROVED FOR THE ATTORNEY GENERAL
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